

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-230

COMMONWEALTH

vs.

FRANCISCO REYES.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Francisco Reyes, appeals from his convictions of two counts of rape of a child by force, G. L. c. 265, § 22A, and three counts of indecent assault and battery upon a child under the age of fourteen, G. L. c. 265, § 13B. The defendant raises four issues on appeal. First, he argues that prejudicial error arose when the Commonwealth's expert witness implicitly vouched for the complainant. Second, the defendant asserts that the same expert witness improperly bolstered her own testimony by describing the results of a sexual abuse study in protracted detail. Third, he contends that irrelevant, prejudicial photographs were used to appeal to the jury's sympathy. Finally, the defendant challenges the sufficiency of the evidence as to both counts of rape of a child

by force and one count of indecent assault and battery. On the basis of the trial errors, we reverse.

Background. We summarize the trial evidence as the jury could have found it. The complainant is the defendant's niece, and the incidents occurred in 2014 and 2015 when they were living together.¹ The complainant was thirteen at the time, and was "close" with the defendant, as they would take trips together to the movies, the mall, or for walks outside.

The defendant was alleged to have pursued two separate courses of criminal conduct against the complainant. First, the complainant stated that the defendant repeatedly paid her between \$10 and \$20 to give the complainant massages, where he touched her breasts and her stomach under her clothes. Second, the complainant, on at least two occasions, fell asleep in the defendant's bedroom and awoke to the defendant pulling down her pants. Once, the defendant penetrated the complainant digitally. On the other occasion, the defendant penetrated the complainant with his penis. The incidents lasted "[a] couple seconds." Although her sister was in the house both times the defendant penetrated her, the complainant did not tell anyone because she "didn't know what to say."

¹ The complainant split her time between her mother's house and her father's house. The defendant lived permanently with the complainant's father.

The record is unclear as to whom the complainant first reported her allegations, but she participated in an interview regarding those allegations at Berkshire County Kids Place on September 15, 2015. On September 21, 2015, she underwent a physical examination by pediatric sexual assault nurse examiner (SANE nurse) Ann Hutchinson, who had also attended the interview. The examination revealed no physical evidence of abuse. The defendant was charged with two counts of rape of a child by force and three counts of indecent assault and battery upon a child under fourteen.

At the jury trial, the complainant was the only eyewitness who testified regarding the alleged assaults. Both parties also introduced expert testimony.² The SANE nurse, Hutchinson, as the Commonwealth's expert witness, testified to her findings as a result of the physical examination she had conducted. Although the exam results were negative, Hutchinson told the court that "normal" results were not unusual "at all." Hutchinson also stated that the defendant's allegations were consistent with the results of her exam.³ She then stated that she was familiar with

² The defendant called Dr. Marshal Trubow as an expert witness.

³ This portion of Hutchinson's testimony went as follows:

Witness: "Whatever may have happened to her had happened in a distant past from -- in my way of looking it's either within five days or it's more than five days, so most things heal very quickly and in this part of the body they heal very quickly."

"all" of the studies related to child sexual abuse, and then named and described the results of a study entitled, "Normal Does Not Mean That Nothing Happened."

The Commonwealth also introduced evidence from Detective Sergeant John Soules regarding a series of photographs he had taken of the defendant's apartment. The pictures were taken three months after the incidents were alleged to have occurred. One of the photos showed a caved-in ceiling from an unspecified portion of the apartment, and two others depicted a large amount of dog excrement on the floor. Soules testified that these photos showed

"another area, I believe it was the third floor. I don't remember exactly where it was. It was the corner of the -- one of those areas on the -- on the attic floor. I just remember there was some dog excrement on the -- on the ground and that's -- that's really all I remember about that area."

The complainant was not asked to comment on the three photos, but during the prosecutor's closing argument he directed the jury to do the following:

"Look at the life that [the complainant] was living in. Go from photo to photo, see the caved in ceiling, see the bucket of water near the electrical light, see the room that just had dog excrement everywhere, that was [the

Prosecutor: "So did you find the results of her examination consistent with what [the complainant] had reported?"

Witness: "Yes."

complainant's] life, that was [the complainant's] life during that time"

The jury convicted the defendant on all counts. He timely appeals.

Discussion. The defendant's trial counsel objected to Hutchinson's statements that the complainant's physical exam results were not unusual, and lodged an objection at the end of Hutchinson's characterization of the scientific study. Counsel also objected to the portions of the prosecutor's closing argument mentioned above. As such, we review those claims for prejudicial error. See Commonwealth v. Cruz, 445 Mass. 589, 591 (2005). Because the defendant did not object to the introduction of the photographs, we review their admission for error creating a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

1. Expert witness testimony. "[I]t is well within the province of a medical expert witness to explain that an absence of physical findings does not necessarily indicate an absence of abuse." Commonwealth v. Quincy Q., 434 Mass. 859, 873 (2001). However, an expert witness is not permitted to present testimony that "a reasonable jury would think . . . implicitly [vouches] for the credibility of the complainant." Commonwealth v. Quinn, 469 Mass. 641, 647 (2014). This includes testimony that the complainant's "condition in any way conformed to or was

consistent with the general characteristics of a sexually abused child." Commonwealth v. Swain, 36 Mass. App. Ct. 433, 445 (1994). "The danger of vouching 'is greater where the witness is testifying as both a direct witness and an expert, particularly where the witness offers fresh complaint testimony.'" Quincy Q., 434 Mass. at 872, quoting Commonwealth v. Richardson, 423 Mass. 180, 186 (1996).

Here, Hutchinson's testimony as both the treating nurse and an expert on child sexual assault made the jury especially susceptible to vouching. See Commonwealth v. Velazquez, 78 Mass. App. Ct. 660, 667 (2011) (courts have "long and frequently . . . cautioned" as to the danger of implicit vouching when a percipient witness also testifies as an expert witness, particularly in sexual assault cases). See also Commonwealth v. McCaffrey, 36 Mass. App. Ct. 583, 593-594 (1994) (urging Commonwealth to "utiliz[e] sexual abuse experts who have no connection with and make no references to the child victim"). Hutchinson told the jury that she was aware of the complainant's allegations and that the results of her physical exam were not unusual "at all." Alone, that would likely be enough for us to find error, but Hutchinson was then explicitly asked whether the results of the complainant's examination were consistent with her allegations, and Hutchinson responded, "Yes." See Swain, 36

Mass. App. Ct. at 445. We conclude that the admission of this portion of Hutchinson's testimony was error.

2. Sexual abuse study. An expert is prohibited "during her direct examination from informing the jury about the facts or data she considered that were not in evidence but that would be admissible with the right witness or proper foundation." Commonwealth v. Barbosa, 457 Mass. 773, 785 (2010). On direct examination, Hutchinson stated that she was familiar with "all" of the studies on physical evidence of child sex abuse, then cited by name to a study entitled "Normal Does Not Mean Nothing Happened." She proceeded to summarize, and possibly mischaracterize, the study's results.⁴ As this study was not in evidence, neither the study citation nor Hutchinson's description was admissible. See Commonwealth v. Greineder, 464 Mass. 580, 583-584 (2013), cert. denied, 571 U.S. 865 (2013). Thus, the admission of this portion of Hutchinson's testimony was also error.

3. Photographs and closing argument. "The relevance threshold for the admission of evidence is low. Evidence is relevant if it has a rational tendency to prove an issue in the case, or render a desired inference more probable than it would

⁴ The defendant asserts that Hutchinson's description of the study was misleading. As the study itself is not in the record, we express no view on the accuracy of the description.

be [otherwise]" (quotations and citations omitted).

Commonwealth v. Adjutant, 443 Mass. 649, 657 n.11 (2005). "In closing argument, counsel may argue the evidence and the fair inferences which can be drawn from the evidence. Counsel may also attempt to assist the jury in their task of analyzing, evaluating, and applying evidence. Such assistance includes suggestions by counsel as to what conclusion the jury should draw from the evidence" (quotations and citations omitted).

Commonwealth v. Grimshaw, 412 Mass. 505, 510 (1992). In deciding whether to reverse based upon an error in a prosecutor's closing argument, we consider

"(1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave to the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusion."

Commonwealth v. Lally, 473 Mass. 693, 708 (2016), quoting Commonwealth v. Wood, 469 Mass. 266, 285 (2014).

The photographs, as a set, displayed the layout of the defendant's home, which had relevance to the Commonwealth's argument that the complainant's sister would not have heard or seen the assaults. They were introduced for this purpose. Thus, we cannot say that the admission of the pictures themselves was an abuse of discretion. See Commonwealth v. Rollins, 470 Mass. 66, 80 (2014). However, the prosecutor erred

by making pointed and repeated references to the pictures during closing argument for reasons well beyond the layout of the home. The prosecutor asked the jury to view these photographs not only for the relevant purpose for which they were admitted, but also as evidence of "the life that [the complainant] was living in," a matter that had no bearing on the disputed fact issues in the case. Appealing to the jury's sympathy in this way was improper. See Commonwealth v. Santiago, 425 Mass. 491, 495 (1997).


4. Collective effect on trial outcome. Given the nature of the case -- the lack of corroboration for the complainant's claims, Hutchinson's testimony as both an expert witness and a fact witness, and the prosecutor's repeated directive to the jury to consider inflammatory pictures for an improper purpose -- we cannot conclude the errors were not prejudicial. While mindful that the judge gave the jury a general instruction to not base their verdicts on emotion or sympathy, we are not persuaded that was enough to cure the errors in this case. See Commonwealth v. Beaudry, 445 Mass. 577, 585 (2005). We therefore reverse.

Conclusion. As set forth in the margin, the evidence as to count 4, charging indecent assault and battery upon a child

under the age of fourteen, was insufficient.⁵ Therefore, on that indictment the judgment is reversed, the verdict is set aside, and judgment shall enter for the defendant. On the remaining indictments, the judgments are reversed and the verdicts are set aside.

So ordered.

By the Court (Green, C.J.
Agnes & Desmond, JJ.⁶),


Clerk

Entered: June 10, 2019.

⁵ The defendant argues, the Commonwealth concedes, and we agree, that count 4 is unsupported by sufficient evidence. However, contrary to the defendant's argument we conclude that the complainant's testimony provided sufficient evidence to support convictions on counts 1 and 2 -- namely that the defendant used force to effectuate the alleged rapes. See Commonwealth v. Armstrong, 73 Mass. App. Ct. 245, 254-255 (2008). Any determination of the complainant's credibility is left to the jury.

⁶ The panelists are listed in order of seniority.